completely changed his position from one of uncertainty to one of stability. On the other hand a sudden decision to enforce the section strictly would have the effect of driving him out of business altogether. It is impossible to say what his prospects were. However, as he was and had been for some time earning $300 a month at the time of his death, I will fix the damages on behalf of the dependants on that basis. I award the widow the sum of $5,000, the infant child the sum of $2,500, and the mother the sum of $1,000, making $8,500 in all. I do not consider it necessary to make any award in respect of either of the sisters one of whom is now married and the other working.

In addition there is the claim on behalf of the estate for damages in respect of loss of expectation of life. To attempt to assess damages under this heading is what Simon, L.C. described in *Benham v. Gambling*[1] as an attempt to equate incommensurables. He also says in the same judgment that it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. Moreover later, His Lordship declares that the degree of happiness to be attained by a human being does not depend on wealth or status. What then had this young man to look forward to?

Normally, a considerable number of years of married life with his wife and family would have been his lot, and of those years he has been deprived at the comparatively early age of 29.

I award his estate the sum of $1,000 in respect thereof, and this amount together with the agreed special damage of $550, make a total of $10,050. I give judgment accordingly for this sum against both defendants with costs to be taxed.

Order accordingly.

AHMAD SHAH BIN YASSIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Taylor, J.) January 23, 1952]

[Selangor — Criminal Appeal No. 76 of 1952]

Criminal Procedure Code, s. 319(ii) — Misjoinder of Charges.

The accused pleaded guilty to a charge of cheating and another of theft, both profferred at the same time.

Held, the misjoinder vitiated the trial.

Held further, the Court had discretion to order a retrial but in the peculiar circumstances of the case the Court exercising the powers of the Sessions Court in the interest of justice had power to charge the accused and record his plea.

CRIMINAL APPEAL from Sessions Court, Kuala Lumpur.

Appellant in person.

D. M. K. Grant (Deputy Public Prosecutor) for respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — This accused was charged in the Sessions Court with cheating and theft. The two offences were committed within a month but were not connected with one another and therefore the two charges could not be joined in one trial.

The accused pleaded guilty to both; he had previous convictions and the learned President sentenced him to two years and three years consecutively.

The cheating was in respect of $35 only but it was effected by a mean and heartless trick, the accused taking advantage of the anxiety of a woman over the custody of an adopted child. The theft was of jewellery estimated at $70 belonging to people who had allowed the accused to stay in their house. Either of these offences taken separately might have been dealt with leniently apart from the previous convictions, and even in view of the previous convictions the total sentence of five years was excessively severe.

In spite of the fact that the accused pleaded guilty to both charges, I am of opinion that the misjoinder vitiated the trial and that both the convictions must be quashed. I do not say that every misjoinder must necessarily vitiate a trial but a misjoinder which directly violates an express statutory provision will usually have that effect.

Counsel for the Public Prosecutor did not ask for a retrial feeling, and rightly, that the prosecution had made the initial error but retrial is a matter of discretion and in the circumstances of this case I feel that justice required that some further proceedings should be taken. I therefore explained to the accused that both his convictions were quashed and that the proceedings would start *de novo* and caused him to be charged afresh with the cheating before me, exercising the powers of the Sessions Court given to the High Court by the Courts Ordinance. This is an unusual course but in the peculiar circumstances of this case I thought that it would be difficult for a Sessions or Magistrates' Court to deal with the matter satisfactorily, and in any event, sending the prisoner back to a lower Court would have involved delay, expense and probably embarrassment to him; he pleaded guilty to the charge and to the previous convictions and I then sentenced

him to twenty months' rigorous imprisonment, to run from the date of his arrest.

This leaves the charge of theft technically outstanding but the Deputy Public Prosecutor gave an undertaking that no further proceedings in respect of that charge would be taken.

On the general question, I would observe that while it is clearly the duty of those in charge of prosecutions, to guard against misjoinder and other errors in charges, it is also the duty of Presidents and Magistrates to examine all charges critically before calling on the accused to plead and to rectify errors at the earliest opportunity. This is especially important where the prosecutors are not trained lawyers. In a case such as the present it would, I think, have been quite easy to charge the accused with one offence before a Magistrate and with the other before a different Magistrate or President. In many cases this could easily be done in the same Court building on the same day. This does not mean that the separate trials must necessarily be before a different Court though that arrangement is obviously preferable. Where, as in a place where there is only one Magistrate, such a course would involve undue delay, the remedy is simply to charge the man with one offence without disclosing to the Magistrate that there is another charge, and after he has been acquitted or convicted on that charge, to charge him with the second offence.

Order accordingly.

KOH KEH HONG v. AV. PL. PALANIAPPA CHETTIAR.

[Orig. Civ. Juris. (Abbott, J.) January 24, 1952]

[Seremban — Civil Suit No. 10 of 1950]

Land — Sale of land — Mortgage outstanding - Attornment of tenants to purchaser — Registrable transfer — Variation of written contract by conduct — Abandonment of relief prayed for — Discretion of Court.

By an agreement of sale the defendant was to convey land free from all encumbrances to the plaintiff upon the immediate payment of $4,000 and the payment of $14,500 one month after signing "completion of the transfer" to be made on or before April 24, 1943; in the event of failure on the part of the defendant to "execute a valid and registrable transfer" the defendant was to pay a monetary forfeit. On April 23, 1943 the plaintiff paid $14,500 to the defendant's solicitor and the defendant executed a document of transfer which was handed to the plaintiff. On the same day the defendant took the plaintiff to the land in question and introduced him to the tenants, requesting them to pay rent to the plaintiff as the new owner of the property. On this date there was an outstanding mortgage and it was agreed that the money was to be used to pay off the mortgage. The mortgage was not paid off. The plaintiff collected all rents. On March 6, 1945 the defendant wrote to the tenants on the land demanding payment of rents to himself; he claimed that as the land was not free of encumbrance he had failed to perform his part of the agreement and was entitled to get his land back on his payment to the plaintiff the deposit and compensation and to accounts from the plaintiff for rents collected.

Held, the conduct of the parties in signing the document of April 23, 1943 and in the plaintiff being pointed out as the purchaser of the land amounted to a variation of the terms of the agreement, namely that the defendant agreed to transfer and the defendant to accept encumbered land and there was, therefore a complete sale when the document was executed. The plaintiff was entitled to a declaration that he was the true and lawful owner of the land.

Held further, that where a prayer for a specific relief was abandoned at the trial the Court, in order to satisfy the insistent demand of justice and acting under an omnibus prayer for "such further and other relief as may seem just" had a discretion to resurrect the abandoned prayer.

CIVIL SUIT.

R. V. H. Rintoul for the plaintiff.

F. J. Woodward for the defendant.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Abbott, J. : — Because of their somewhat complicated nature, it seems to me to be best that I should set out the facts, together with my findings of fact, in narrative form.

The defendant is a Chettiar moneylender who owned three pieces of land, together with houses on the land, in Seremban. In the early part of 1943 he wished to sell the property and, the fact becoming known to some brokers, a prospective purchaser was produced. The prospective purchaser was the plaintiff, who is a Chinese merchant. On the 23rd of March 1943 the plaintiff and the defendant, at the suggestion of the defendant, repaired to the offices of Mr. Yong Sze Lin, a well-known lawyer practising in Seremban, where an agreement for the sale was drawn up and signed by the parties. The agreement provided that the defendant would convey the land *free of all encumbrances* to the plaintiff, upon the consideration of the immediate payment of $4,000 and the payment of $14,500, within one month of the signing of the agreement. The agreement further provided that "the completion of the transfer" was to be made on or before the 24th of April 1943 and that, in the event of failure on the part of the defendant to "execute a valid and registrable transfer", he (the defendant) was to pay a monetary forfeit. On the 23rd of April 1943 the parties again went to the offices of Mr. Young Sze Lin where the $14,500 was paid by the plaintiff to Mr. Yong Sze Lin, and the defendant executed a document of transfer which was handed to